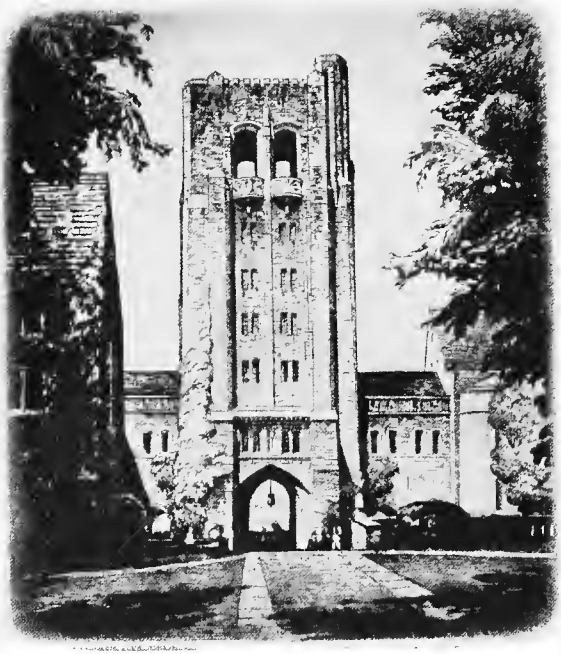

A BRIEF ANALYSIS OF SALE.

AN ESSAY.

BY

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TABLE OF CASES.

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A Brief Analysis of Sale.[1]

Implanted firmly in the human breast is the desire *ad rem acquirendam*, and as soon as this desire became impossible of gratification by the simple taking possession of the desired object, *exchange* arose. A man seeing his neighbor proprietor of some coveted article, could no longer simply possess himself of it; but by offering to relinquish on his part something for which he cared less, he might induce his neighbour to a corresponding relinquishment, and so accomplish his purpose.

In this idea of giving "quid pro quo" we find the origin of sale. We have seen that the idea first manifested itself in the form of *Exchange*. Sale, while similar to exchange, is not identical with it, but is a modification of it. Exchange is the giving of one chattel for another; sale is the giving of a chattel for a sum of money—the "representative of all value." In both cases, there is an interchange of property, and it is not perhaps at first glance easy to see the importance of the distinction between them, but they are distinguished by almost all writers on the subject, although

[1] This Essay will treat only of the sale of *Personal Property*.

a few pronounce the two transactions practically the same, and there appears to be some controversy as to whether they are governed by the same principles of law. The principle of distinction appears to be this: whenever the chattels themselves are looked to as the objects of the transaction—whenever it is A.'s chattel that B. wants, and B.'s chattel that A. wants, and on the other hand, it is A.'s chattel which he promises to *give*, and B.'s chattel which he promises to *give*, the transaction will be an exchange, and A. cannot demand money of B. on his promise, nor will the contract be satisfied by a tender of money.

It would seem that the idea of utility enters into the consideration, investing the chattels with a peculiar or special value, in the eyes of the parties, quite distinct from their market value or price in money. The Roman law recognized clearly the absence of all idea of money, or general value, in the minds of the parties to an exchange, by treating it as incomplete until actual delivery on one side, upon which the other party was absolutely bound to deliver the article he had agreed to exchange, unless indeed the first deliverer chose to reclaim his property.[1] But it was not, like sale, a consensual contract, for the breach of which an action lay—for the reason, obviously, that money never having been in the minds of the parties, the damages could not be computed in money.

While the Common law has not gone to this extent,

[1] Sandar's Justinian, 444.

and an action may be maintained for the breach of a contract of exchange, the action is not the same as on a contract of sale. In the case of Harrison *vs.* Fowle, the contract proved was, that payment was to be partly in money, and partly in buttons. The plaintiff did not declare specially, but brought *indebitatus assumpsit*, and was non-suited. This case is cited 1 H. Bl. 287, and is apparently contradicted by Sheldon *vs.* Cox.[1] There A. agreed to give B. a horse, for a mare and £40. The animals were mutually delivered, but B. refused to pay the money, alleging the unsoundness of the horse, which had been warranted. A, thereupon brought *indebitatus assumpsit*, for goods sold and delivered. B. moved for a non-suit, upon the ground that the transaction was a barter and the plaintiff should have declared specially; the motion was denied, the judge pronouncing the horse *sold* and delivered. Here the mare and the money were regarded as the price of the horse—she was supposed to represent her market value, which plus £40 was the value of the horse. The case of Hands *vs.* Burton,[2] is similar and is a clear illustration The contract was: "I will give you £30 for your horse, in consideration that you will buy my brother's horse at £14, the difference to be paid you." The agreement was consummated, and the first mentioned horse, which had been warranted, was alleged unsound, the action being upon the breach of warranty. Plaintiff recited the contract as above,

[1] 3 B. & C. 420. [2] 9 East, 349.

and alleged that he had "paid the £30." It was proved that he had only paid in actual money £16, the brother's horse having been given in addition thereto—this, it was contended, was not *paying* £30, and a non-suit was asked for, and of course refused, as there was an obvious "monetization" of the brother's horse. Where there had been an agreement to give goods for goods from time to time, the defendant stopped sending them, so that the plaintiff sent in excess, whereupon he sued in debt for goods sold and delivered, and was non-suited—he should have sued for non-delivery pursuant to the contract. Here there had been no reference to the money value of the goods, and no agreement, express or implied, to send them *or* their market value difference in money—the exchanges for reasons of the parties' own may have been on an entirely different basis from the market value of the articles.[1] Harrison *vs.* Fowle, supra, is meagrely reported, and as reported is inconsistent with the other cases—we must therefore consider it erroneous, or that its peculiar circumstances showed that the buttons were regarded as such, and not as representatives of value. The rule seems clear that whenever the articles are considered as representatives of value, the transaction is a sale, otherwise it is an exchange. The doctrine has been applied quite strictly in Read *vs.* Hutchinson.[2] The case was as follows: Plaintiff was a wine dealer, and the following memorandum

[1] Harrison *vs.* Luke, 14 M. & W. 420.

[2] 3 Campbell, 352.

appeared: "Sold for account Mr. James Read to John Hutchinson, seven pipes red Guernsey wine, at £47 per pipe. To be paid for by Mr. Edward's bill on Mr. P. Young, of £328, 12s., due in December next, without recourse on the buyer in case of its not being paid."

The bill was dishonoured, and the plaintiff sued in assumpsit, contending that the defendant knew of the worthlessness of the bill, and was therefore still indebted. But Lord Ellenborough pronounced the transaction a barter of the wines against the bill of exchange, and said that the defendant was never indebted for the price of the wines, and the law could not imply a promise to pay for them—that the defendant was not a purchaser, but a person who had tortiously obtained possession of the goods, and was answerable for their value, the proper remedy being trover or deceit. Plaintiff was non-suited. It will be observed that in this case, the memorandum reads "sold for account," a clear indication, it seems to me, that an ordinary business transaction was in contemplation. Moreover, the amount of the bill was for the money value of the goods, less eight shillings—practically equal to it. So far there is nothing to indicate a barter. But we are here met with the clause waiving recourse against the buyer. This was considered evidence that the plaintiff for some reason wished to obtain the bill for its own sake, and that it was therefore a chattel—but that not being the chattel it was represented to be, but

merely a worthless scrap of paper, defendant was liable in deceit or trover. This is an extreme case, and is certainly the nearest possible approach to a monetary transaction; it is certainly quite as reasonable to suppose that the exonerating clause was agreed to by the plaintiffs because they had confidence in the parties to the bill, as to suppose that they did not care so much about payment as to get possession of that particular bill, and when his Lordship went so far as to non-suit the plaintiffs, it showed a disposition to limit the term "sale" to transactions which are monetary in the strictest sense.

The American adjudications upon this point are not numerous; in Way *vs.* Wakefield,[1] a recovery under the common counts was allowed for harness to be paid for in lumber; but the facts show a monetization of the lumber. The case of Clarke *vs.* Fairchild,[2] is one in which the pay was to be in labor, and the general question as to the propriety of *indebitatus assumpsit* when the payment is not to be in money is discussed, and the Vermont case is cited with approbation, the two cases deciding that when there has arisen an obligation to pay money or its equivalent, *indebitatus assumpsit* will lie. Both cases are commented upon in Mitchell *vs.* Gile,[3] as going perhaps too far in applying the rule to the facts. Mitchell *vs.* Gile is almost identical with Harrison *vs.* Luke, supra, and a like conclusion was reached. It was held in Vail *vs.*

[1] 7 Vt. 123. [2] 22 Wend, 576. [3] 12 N. H. 390.

Strong,[1] that proof of a contract of exchange was not proof of a contract of sale, and vice versa, the two contracts being different in law; and in Loomis *vs.* Wainwright,[2] it was said that an agreed price was essential to a contract of sale, but needless in an exchange, where the commodities exchanged, whatever their supposed value, are mutually received as equivalent for each other. Both contracts are said to be the same in law, by Bigelow, J., in Commonwealth *vs.* Clark,[3] and other cases agree with this view, but the weight of authority recognizes the rule as stated in Vail *vs.* Strong. The contracts are, however, exceedingly similar.[4] The distinction between them receives a further recognition in the fact that an agent with authority to sell, has no authority to exchange.[5]

One characteristic of sale, then, is that it must be a giving of property as distinguished from money on one side, for money as distinguished from property on the other. The word "sale" has been variously defined. A few of the leading definitions are: "A sale is a contract for the transfer of property from one person to another for a valuable consideration."[6] "Sale is a mutual agreement between the owner of goods and another that the property in the goods shall for some price or consideration be transferred to the other at such time and in such manner as then agreed."[7] "A sale is a contract between the parties

[1] 10 Vt. 457. [2] 21 Vt. 528. [3] 14 Gray, 367.
[4] Hazard *vs.* Hamlin, 5 Watts 201. [5] Guerreiro *vs.* Peile, 3 B. & Ald. 616.
[6] 2 Kent's Com. 468. [7] Blackburn on Sale, Introd. p. xiv.

to give and pass rights of property for money; which the buyer pays or promises to pay to the seller for the thing bought and sold."[1] "A sale is a transfer of the absolute or general property in a thing for a price in money."[2] There are many other definitions, nearly the same.

The first three definitions are faulty in failing to distinguish between sales, and contracts to sell, and those of Kent and Blackburn would include exchange. The definition of Benjamin is the most accurate, and the one generally adopted. To satisfy the definition, the transaction must be, 1. A transfer of the absolute or general property. 2. For a price in money. The second point has already been considered as fully as space will permit. As to the first point, nothing is a sale which transfers merely a special property, as in certain classes of bailments.[3] Where goods are *sold*, the vendor must be utterly shorn of all right of property in them, and the vendee's right of property must be complete.

It would be impossible in an essay of this kind, to consider the various modifications of this once simple transaction, such as sales upon condition, sale and return, etc., nor can sales on credit be given more than a passing notice. The authorities seem clear, that when a vendor agrees to accept the vendee's promise to pay at a future day certain, the vendee is entitled to

[1] Wayne, J., 8 Howard 544. [2] Benjamin on Sales, 1.
[3] Benj. on Sale, 2.

the goods at once, the vendor being considered as accepting the *promise* of the vendee as consideration for at once transferring to him the absolute ownership of the goods.[1] So that by the completion of the contract, in the case of a sale on credit, the ownership is changed, and it only remains for the vendee to take possession, which he may do at any time. Let us now inquire whether the same be true where nothing is said as to time of payment or delivery. Is the property transferred upon the completion of the contract?

By the Civil law, the contract of sale is *consensual;* that is, complete by the consent of the parties. And upon the principle that the obligation as to a particular thing ceases with the existence of the thing, if without fault in the vendor the article is destroyed before payment and delivery, or either, the vendor is released from his obligation, but not the vendee.[2] But it cannot be said that the property is transferred by the mere contract. For that purpose there must be delivery, and the price must be paid, or some satisfaction given to the vendor. The agreement merely entitles the vendee to require that he shall be put in possession. If A. agrees to sell a thing to B. and sells and delivers it to C., C. is the proprietor; but B. may sue A. for indemnity. A thing is at the risk of the purchaser from the completion of the agreement, though he

[1] Sheppard's Touchstone, 224; Spartali *vs.* Benecke, 10 C. B. 223, and cases cited. Hilliard on Sale, 177.

[2] Pothier on Sale, 187 *et seq.*

has not been put in possession of it, and is not proprietor.[1]

The law is practically the same by the Code Napoleon, § 1582.[2] Although objected to by Puffendorff, Barbeyrac, and others, as not consistent with natural justice, such is the undoubted rule of the Civil law. Let us now inquire what the rule of the Common law is upon the same point. Title will pass whenever the parties intend that it shall pass, irrespective of legal rules.[3] But parties so often neglect to manifest their intentions, that the investigation of those legal rules by which such cases are governed becomes exceedingly important. In speaking of sale, Puffendorff says: "Ejus simplicissimum genus est, si ubi in pretium fuit consensum, emptor statim pretium, venditor mercem offerat, tradatque."[4] This is the normal sale and the principles which govern it, should govern the law of sale to day.[5] Modern convenience has rendered it impossible to require immediate delivery of the price on one hand, and of the thing on the other, yet obviously since ownership is transferred every day, there must be something equivalent thereto. It would be

[1] Cumin's Manual of Civil Law and Notes 5, 6.

[2] See Repertoire de Jurisprudence (Merlin), 440.

[3] Benjamin, 228. Gilmour *vs.* Supple, 11 Moore P. C. 556. Pratt *vs.* Parkman, 13 Pick. 45. Wood *vs.* Brooks, 2 Sawyer C. C. 576. Woods *vs.* Half, 44 Texas, 633. Whitcomb *vs.* Whitney, 24 Mich. 486. Bacon *vs.* Erdman, 57 N. Y. 656. Hurff *vs.* Hires, 11 Vroom, 581. 1 Lowell's Decis. 348. Boswell *vs.* Green, 1 Dutch. 390. Contra, Hires *vs.* Hurff, 10 Vroom, 4, (reversed by Hurff *vs.* Hires). Ferguson *vs.* Bank, 14 Bush, 566.

[4] Puff. Lex. Nat. Cap. XV, § 9.

[5] Note to Hurff *vs.* Hires, 18 Am. Law Reg. 174.

difficult to imagine a state of society so primitive that such actual manual delivery simultaneously of the price and thing would be always practicable—there soon began to elapse time between the making of the agreement, and the actual carrying out of it; and it is of the utmost importance to distinguish between the contract having for its object a sale, the sale itself, and subsidiary contracts, express or implied, or under certain circumstances imputed by law with reference to the surrender of possession.[1] It seems that much of the confusion in text books is due to a failure to keep these distinctions clearly in mind—and awkward expressions, such as "completed sale" are constantly met with; the term "sale" implies completeness. The early writers state the law thus: "If one sell me his horse or any other thing for money or other valuable consideration, and, *first*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or *secondly*, all; or *thirdly*, part, of the money is paid in hand; or *fourthly*, I give earnest money albeit it be but a penny, to the seller; or *lastly*, I take the thing into my possession, bought by agreement, where no money is given, earnest paid, or day set for payment, in all these cases there is a good bargain and sale of the thing to alter the property thereof."[2]

"In all agreements there must be a *quid pro quo* presently, except a day be expressly given for pay-

[1] Amos on Jurisprudence, 221. [2] Sheppard's Touch. 224.

ment, or else it is nothing but communication. If the bargain be that you shall give me £10 for my horse, and you give me one penny in earnest, which I accept, this is a perfect bargain—you shall have the horse by an action in the case, and I shall have the money by an action of debt. If I say the price of a cow is £4, and you say you will give me £4. and do not pay me presently, you cannot have her afterwards without I will, for it is no contract; but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. If I sell my horse for money, I may keep him until paid—but I cannot have an action of debt until he is delivered, yet the property in the horse is by the bargain in the bargainee or buyer. But if he presently tender me the money and I refuse, he may take the horse or have an action of detinue, and if the horse die in my stables between bargain and delivery I may have an action of debt for the money, because by the bargain the property was in the buyer."[1]

There are thus according to Sheppard, five ways of making "a good bargain and sale of goods, to alter the property thereof."

1. Fixing a day certain for payment and delivery.
2. Payment.
3. Part payment.
4. Giving earnest.

[1] Noy's Max. 87–89.

5. Immediate delivery and acceptance, in the absence of the first four ways.

He proceeds to state the remedies of the vendor and vendee under the cases supposed. In the first case the vendee may have an action for the thing, the vendor for his money. In the second, the vendee may sue for *and recover* the thing. In the third, the vendee may sue for the thing, and the seller for the residue of the money. In the fourth, they may have reciprocal remedies, one against the other. And in the last case the seller may sue for his money.

The first case, that of a sale on credit, has already been noticed. The second case is to the effect that after payment, the vendee may sue for *and recover* the thing, that is, may actually get it. In the third, it is certainly now necessary, and probably was then, to tender on one side the rest of the price, and on the other the delivery of the thing, before the actions mentioned could be maintained. In the fourth case, the parties have *reciprocal remedies*—which if it means any thing different from the foregoing, must mean that each has an action of damages against the other if the contract be broken. And lastly, the seller may sue for his money. Looking closely at these cases, does it not appear that, leaving the first case out of consideration, only in the second and last cases has the property passed? It cannot be supposed that in the third case the omission of the words "and recover" was accidental. And in the last case, where delivery is

supposed, the seller does not bring replevin or detinue, but sues for the purchase money.

According to Noy, after earnest given, the vendee may have an action *on the case* for the thing—which can only mean for failure to deliver the thing as agreed; trover, detinue, and replevin, were all well known actions in Noy's time, and if the gist of the action had been the conversion or detention of the plaintiff's property, case would hardly have been the appropriate remedy—true, trover was originally an action on the case, and case will lie whenever trover will,[1] but the latter, with detinue and replevin, being so peculiarly fitted for conversion and detention, it is almost inconceivable that if the case was one to which those actions would apply, the learned writer should not have said so; and it is submitted, that taken with Sheppard's statement as to the case of earnest, and with the fact that detinue is mentioned as lying under circumstances subsequently indicated, the inference is a fair one that the gist of the action was the breaking of the bargain, and that therefore the property had not passed. Noy goes on to say that if the money be tendered and refused, *detinue* will lie. There is certainly, then, a distinction taken by these writers between the cases of payment and delivery, and the case of earnest.

Glanville[2] maintains that delivery, whole or part payment, "or at least earnest" is necessary to effec-

[1] Archbold's N. P. *401. [2] B. X. C. XIV, (Beame's Glanville, 267).

tually perfect a purchase and sale. Bracton says: "Emptio vero et venditio *contrahitur*, cum de pretio convenerit intra contrahentes—dum tamen a venditore arrarum nomine aliquid receptum fuerit—quia, quod arrarum nomine datum est argumentum est emptionis et venditionis contractæ. * * * Et cum arræ non interconvenerint, vel scriptura, nec traditio fuit subsequuta, locus erit pœnitentiæ, et impune recedere possunt contrahentes a contractu."[1] Both writers were stating the law as it was in their time, and both proceed to state that after whole or part payment or delivery, the parties are firmly bound—but after earnest given, the vendor may recede, not *impune*, as after a mere contract, but on restoring double the earnest money to the vendee. The vendee may recede on forfeiting the earnest itself. Bracton adds that it is delivery which passes the title. It is impossible not to observe how nearly identical are the laws of England on this point, as laid down by these early writers, with the Civil law. The rule as to earnest is the same—that is, after earnest given either party could recede, in the way mentioned by Bracton. Originally, indeed, there were two kinds of earnest known to the civil law. One given where the bargain was only projected, the other, when the bargain was concluded. The first amounted practically to paying for what we now call the "refusal" of the thing. The proposed buyer gave something, generally though not necessarily money, to the pro-

[1] B. II C. XXVII (Twiss's Bracton (1878) Vol. I, 489).

posed seller, upon the condition that the seller would await his decision as to whether he would enter into the contract of sale. The property in the money or thing given as earnest became absolute in the seller upon the buyer's decision not to contract. On the other hand, if the donee of earnest declined fulfilling his obligation to abide by the decision of the donor, he forfeited as penalty twice the value of the earnest. The second kind of earnest was given after the contract of sale was complete, and merely "ut evidentius probari possit convenisse de pretio" not that "sine arrha conventio nihil proficiat," as the agreement might be proved in some other way. And in this case, the bargain being complete *without* the earnest, the remedies were for the breach of that bargain, by actions thereon.[1] But it is maintained by Benjamin and the majority of writers, that an entire change was made in the law of earnest, by Justinian.[2] It is said that by this change the distinction is practically wiped out, and that whether the earnest be given before or after the main contract, the result is the same, and the parties may now recede on forfeiting the earnest given, or restoring double, as the case may be. The provision of the Institutes, so far as important here, is: "Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arrha quidem data fuerit; nam quod

[1] Pothier, Sale, §§ 506, 507.

[2] Inst. lib. 3 tit. XXIII, 1 (quoted Benj. on Sales, 2d edit. 147).

arrhae nomine datum argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus quæ sine scriptura consistunt obtinere oportet—nam nihil nobis in hujusmodi venditionibus innovatum est."

The law goes on to ordain that "in his (venditionibus) autem quæ scriptura conficiuntur" the contract of sale shall not be perfect without certain formalities. "Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor sine pœna recedere ab emptione. Ita tamen impune eis recedere concedimus, nisi cum arrharum nomine aliquid fuerit datum. Hoc etenim subsecuto, *sive in scriptis, sive sine scriptis*, venditio celebrata est, is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit. Si vero venditor, duplum restituere compellitur, licet super arrhis nihil expressum est." Pothier (§508) urgently contends that the whole text shows that only the first kind of earnest is spoken of. The ground of his argument is that the phrase beginning "Ita tamen," following as it does a declaration that while certain things are wanting either party may recede, contemplates a state of facts when the contract was not yet complete, and therefore the second kind of earnest could not have been meant. There follows immediately, however, a provision that where earnest has been given "et sive in scriptis sive sine scriptis, *venditio celebrata est*," etc. Pothier construes the last three words, "*venditio cœpta celebrari*," and maintains that the "contract" immedi-

ately afterwards mentioned, is the contract of earnest, as the agreement for the refusal was called; otherwise, a contract of sale with earnest would be less binding than without, and all either party could sue for would be the damages given for breach of the contract of earnest. But granting this, there is a *mutual* release of further liability, and the parties must be taken to have preferred this measure of damages. This view is taken by Benjamin and the majority of writers, although a few agreewith Pothier.[1]

It is thus not difficult to see whence Glanville and Bracton drew their statements of the law, of earnest and the contract of sale. They were expounders of the law of England—Glanville was Chief Justice under Henry II.—and therefore these Civil law rules were also at that time, part of the law of England. But later, when Sheppard and Noy wrote, the Common law had apparently taken a course opposite to that of the Civil law—where, as has been shown, earnest at first completed the bargain so that neither party could escape damages, and then merely operated as a price for the refusal of the thing–and from having originally followed the later Civil law, had grown to regard earnest as completing the bargain and leaving no locus pœnitentiæ; but it still, as submitted above, had not the effect of payment or tender, or delivery.

The law of to-day is pronounced by Benjamin to be substantially as stated by Sheppard and Noy—not,

[1] Benj. on Sale, 149. Sandar's Just., 441, 442.

however, as I have interpreted it—the only exception being the supposed case of the cow, as put by Noy, in regard to which the learned writer observes that the consideration for the sale may have been, and probably was, in those early times, the actual payment of the price, but it has since been held to be the purchaser's *obligation* to pay, unless otherwise provided in the contract.[1] And the modern rule is said to be that where there is a contract of sale of specific goods, and nothing remains to be done by the vendor as between him and the vendee, and nothing is said as to the time of payment and delivery, the property at once vests in the vendee, the vendor only retaining a *right of possession* until paid. The authorities for this position are numerous, in England and America, and such is unquestionably the usual statement of the law. But the statement is hardly consistent with other rules and maxims of law, and is, to say the least, unfortunate. Of the text writers, those who maintain it, are Blackburn, Ross, Kent, Benjamin, Long, Bouvier, and some others, among whom may be mentioned Judge Sharswood, who says, in the clearest way, that there is no necessity for earnest or anything else, except the mutual assent of the parties.[2] Wherein he differs with the learned Commentator, who is followed by Parsons, Smith, Williams and Broom, and supported by Noy, Sheppard, Glanville and Bracton. Nearly all the modern writers agree that when the bargain is complete, the property

[1] Benj. 232. Blackburn on Sale, *149. [2] Note to 2 Blacks. 448.

passes, the disagreement being as to when the bargain is complete. The earliest source from which this rule springs (which for convenience will be hereafter spoken of as "the Rule") is Noy, who certainly does say that the bargain passes the property. He first states that although the vendor may keep the articles until paid, yet the property is in the bargainee, and then immediately says, that the article after the bargain is at the bargainee's risk, because the property is in him. The last statement shows his reasoning. He got from the Civil law, or possibly from the early writers of his own law, who followed the Civil law on this point, that after the bargain was complete, the risk was in the bargainee, and adds his own reason: because the property is in him—as by the Civil law it certainly was not. Nor do the early English decisions warrant the Rule, as it seems to me—and it may be as well to examine a few of them before proceeding to discuss the more modern ones. "If a man buy of a draper twenty yards of cloth, the bargain is void if he do not pay the money or price agreed on immediately; but if the day of payment be appointed by agreement of the parties, in that case one shall have his action of debt, the other of detinue."[1] This is expressly affirmed in Thorp *vs.* Thorp,[2] which I quote, literatim: "Si un dit al autre, Jeo voile doner tant pour votre chival, et l'autre agree a prendre ceo. si rien pluis passe entre eux et nul earnest est done, et ils depart l'un del autre, ceo en

[1] Dyer, fol. 30. pl. 203. [2] Lutw. 252.

point de evidence n'est d'estre prise mes que une nude communication."[1]

Clearly then, the naked contract not only passed no property, but imposed no obligation. Now, what effect upon this had the giving of earnest? Did it alter this not even binding contract into a conveyance? Distinctly not. According to Lord Holt, "an earnest does not alter the property, but only binds the bargain; and the property remains with the vendor until payment or delivery."[2] And his Lordship expressly reasserts this in Langfort *vs* Tiler.[3] Mr. Benjamin declares that it is nowhere maintained that earnest altered the property; it simply bound the bargain, which, when bound, had that effect. This seems to me a very nice distinction. If binding the bargain and vesting the property are the same, if earnest does one, surely it does the other; if the contract is a conveyance, and earnest makes the contract, it certainly passes the property! If Mr. Benjamin means that earnest is not *necessary* to bind the bargain, that it may be as well bound in other ways, that may be true, but it does not alter the proposition—whatever *has* the effect of binding the bargain, must pass the property; and saying "Earnest does not pass the property" is equivalent to "Binding the bargain does not pass the property." Lord Holt took this view, and gave earnest the effect it had in the old Civil law, whence it had been taken;

[1] See p. 17, Edw. IV., fo. 1 and 2, pl. 2.

[2] Anon. 12 Mod. 344. [3] 1 Salk. 113.

and the 17th Sec. of the Statute of Frauds, which, it may be remarked in passing, is surprisingly like the chapter of the Institutes before quoted, points to the same conclusion: "No contract for the sale of goods for the price of £10 or upwards shall be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in *earnest to bind the bargain*, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged, or their agents lawfully authorized." We are led by this to believe, that before the statute, either the giving of earnest had become obsolete, or that it had merely the effect of securing the refusal of the thing, as in the later Civil law. If the former and more likely alternative be true, a bargain was as effectual without as with earnest, so that a contract without earnest for a less price than the statute named, and one with earnest for a greater, stood on the same footing, and we have the direct authority of Lord Holt for saying that at that time completing the bargain and passing the property were distinct. If we adopt the second alternative, it is too clear for demonstration, that no property passed.

But by Civil and Common law alike there is a marked change in the relation of the parties to the thing wrought by the bargain: As soon as the bargain is struck the risk of accidental loss is with the buyer. And it is this circumstance which is almost invariably stated in connexion with, generally as foun-

dation for, the assertion that by the mere contract the title vests in the buyer. Risk is said by Hilliard,[1] to be the usual test, although unsatisfactory, as clearly involving the logical fallacy of *petitio principii.* The test is certainly unsatisfactory, but the learned writer's objection is scarcely valid. It has been established by numberless decisions, that under certain circumstances, the risk is with the buyer, but it is by no means so clear that under the same circumstances the property is in him also.[2] The position that risk and property are separable seems to have been considered untenable by Judge Shepley in Waldron *vs.* Chase,[3] but the case of Martineau *vs.* Kitching,[4] seems to me show the correctness of the position. The plaintiffs were sugar refiners and were in the habit of selling the defendants the whole of each "filling" of sugar, consisting of from two to three hundred titlers each, the terms always being "prompt at one month; goods at seller's risk for two months;" the "prompt" day being the Saturday next after the expiration of one month from the sale. The defendant had bought four fillings, consisting of specific titlers, and paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred after the expiration of the two months, destroying the whole contents of the plaintiff's warehouse, including the undelivered titlers. It was contended by the counsel for the defence, that

[1] Sales, 37.
[2] Hunn *vs.* Bowrie, 2 Caines, 44.
[3] 37 Me. 417.
[4] L. R. 7 Q. B. 436.

as the goods had not been weighed, the property had not passed, and the risk therefore continued with the plaintiff. Chief Justice Cockburn thought the property had passed, and that the risk was with the defendants, such appearing to him to be the intention of the parties. Mr. Justice Blackburn agreed in the Chief Justice's conclusion, but was not sure that the property had passed, but *whether it had or not*, the risk was with the defendants. He says, "The defendant's counsel contends, that as the property was not weighed, the title did not pass, and it follows as an inexorable rule of law, that it was not to be paid for, as it was still the property of the plaintiffs. This, however, I do not think was the correct way of putting the case, and I do not think we need decide whether the property passed or not. As a general rule, *Res suo perit domino*, the old Civil law maxim, is a maxim of our law, and when you can show that the property has passed, the risk of loss is prima facie in the person in whom the right of property is; if on the other hand you go beyond that, and show that the risk attaches to the one person or the other, it is a very strong argument for showing that the property is meant to be in him. But the two are not inseparable; it may very well be that the property shall be in one and the risk in another."

The learned Judge proceeds to illustrate how a different doctrine would work. In the present case, for instance, if the risk and property must go together,

during the first two months both were in the vendor, and in the event of his bankruptcy, his assignees would take the entire property, and the vendees, having paid the approximate price, would only get so many shillings in the pound as they could come in and prove for, "which would be a monstrous hardship." The stipulation as to the two months' risk of the sellers, on the principle, *Expressio unius exclusio alterius*, is all one with saying, after that time, the risk shall be with the buyer, no matter where the property is. In this opinion Lush, J., concurred. It clearly appears, then, that saying, "I will retain the risk," is by no means identical with, "I will retain the right of property."[1] The correctness of the position now contended for is well shown by the famous note of Sergt. Manning, last cited. It is there emphatically said that from a misapplication of the maxim *Res perit domino suo*, and for no other reason, have the Courts held to the Rule. The maxim is derived directly from the Civil law, and its meaning and application are given by Pothier in answer to the charge of Barbeyrac and others, that the Civil law rule that the risk should fall on the purchaser, though the property was in the vendor, was contrary to natural justice—these writers based their argument upon the maxim above alluded to, and Pothier answers, that this maxim applies when the question arises between the proprietor and those

[1] See also Castle *vs.* Playford, L. R. 7 Ex. 98. Milgate *vs.* Kebble, 3 M. & G. 102, note. Bailey *vs.* Culverwell, 2 M. & Ryl. 567, note.

who have the custody or use of the thing, in which cases the loss falls on the owner, rather than on the innocent custodian But when the question arises between the owner who is debtor of the thing, and one who is creditor of the thing, and entitled to an action to compel the delivery of it, the thing perishes to the creditor. Each party loses the interest he had; the owner, his right of property hampered as it was by lack of power to exercise it without becoming liable in damages, and the buyer his right to compel delivery.[1] And this doctrine seems a very reasonable one. While the vendor might still elect to exercise full ownership over the subject, in derogation of the buyer's *jus ad rem*, yet such a proceeding would render him liable for breaking his contract; and as he was so bound with respect to the thing, it was no more than just that the buyer, who could acquire dominion when he chose, should bear the risk. Risk and property therefore are not in their nature inseparable, as are the right of alienation, and a fee simple; they are but prima facie evidence of each other. If the proposition just contended for is admitted, the authority of a large number of cases supporting the Rule is weakened, as they proceed upon the basis of the maxim alone. It has been said indeed, that the construction put upon the maxim is due to that part of our jurisprudence known as Equity; that at Common law, the risk remained with the vendor until the sale was completed

[1] Pothier, Sale, 188. Bayne *vs.* Walker, 3 Dow, 233.

beyond the mere agreement, but that upon the principle that Equity regards as done what ought to have been done, the buyer is the equitable owner, and the loss must fall on him, both Law and Equity casting the risk on the owner.[1]

This explanation is hardly satisfactory. It is using the doctrine always applied to cases of specific performance, in a case where specific performance will not be enforced. The equitable doctrine is by no means of universal application. Strictly, all contracts ought to be performed as agreed, but Equity only insists upon such performance in certain cases. In the case of the conveyance of land, for example, the doctrine is applied, and of course, consistency requires that a decree for specific performance should follow. But in the case of personalty, except in rare instances, specific performance will not be decreed. Equity works a conversion in the case of a sale of land. The character of the property is changed, as well as its form, and there is no adequate remedy at law. But where merely the form of the property is changed, Equity will not interfere; there will be no conversion. The seller's right to the thing will not therefore be held merely a right to receive money, and the buyer's right the Equitable ownership; but the remedy at law being adequate, the parties will be left to it.

It is submitted that the Equitable maxim is merely a fiction for convenient use, not a principle of juris-

[1] Thompson *vs.* Gould, 20 Pick. 134.

prudence; that if it were such a principle, consistency would require all contracts to be specifically enforceable, with perhaps a very few necessary exceptions; whereas it is certain that the *practical* application of the maxim is only to the few cases where the remedy at law is held inadequate; and the theory must he held to apply no further. The more natural explanation is, I think, the one given by Sergt. Manning. See opinion by Williams, J., Clark *vs.* Spence,[1] where the Rule is stated to be law, but its origin in a misconception of the Civil law hinted at. Let us proceed to the consideration of some of the cases establishing the Rule.

A leading case, it may be said *the* leading case, is Dixon *vs.* Yates et al.[2] The case is an exceedingly long one, and its importance must be my apology for stating it. Dixon had bought of Yates 147 puncheons of rum, lying in Yate's warehouse, and then sold part of them to Collard, who was a clerk in Yates's employ, but carried on business on his own account. The sale by Yates to Dixon, and by Dixon to Collard, took place on the same day, June 28th, 1831. Dixon paid Yates the price in August and September. For the price of the thirty-five puncheons sold Collard, he (Collard) accepted two bills for £240 each; and after the sale, Dixon gave Collard a delivery order on Yates for the thirty-five puncheons. This was the invariable method of delivery in such cases. At the time of the original purchase from Yates, he had

[1] 4 Ad. & El. 469. [2] 5 B. & Ad. 313.

handed Dixon an invoice specifying the casks; and at the bottom was written, "Warehoused by J. B. Yates, in Yates's, Atherton street. On October 5th, 1831, one of the bills accepted by Collard was dishonoured, and taken up by Dixon, who also took up the other, October 29th. On August 13th, 1831, Dixon bought of Yates, another parcel, fifty-one puncheons, and received an invoice specifying the casks and stating that payment was to be at two months, and two months, with a memorandum as to warehousing as before. On the same day, Dixon sold Collard forty-six puncheons. Ten of this second parcel sold to Collard were of the original 147 puncheons before mentioned, and 36 of the 51 puncheons just bought. For the price Collard accepted two bills, dated August 13th, drawn on him by Dixon, and payable in two and three months respectively. One of these bills Dixon paid away. The other he paid to his banker in cash. After the last purchase by Collard, he applied to Dixon for delivery orders, which the latter refused to give, but offered to let him have one or two puncheons, if desired. Collard then addressed an order to Dixon: "Please deliver one puncheon of rum, J. B. 7, J. F. 33, bought August 13th, 1831. A. W. Collard." Dixon gave corresponding order on Yates, and the puncheons were delivered to a purchaser from Collard. These two puncheons were part of the 46 sold to Collard, August 13th. The remaining 44 puncheons, sold August 13th, were the subject matter of the issue. The two last

bills accepted by Collard were dishonoured in due course, and taken up by Dixon. November 18th, Dixon notified Yates to deliver to no one but himself. And on November 21st, he made a written demand for the rum, which Yates declined to deliver. October 26th, Collard had sold 26 puncheons, part of the 46, to Defendant Kaye, who accepted bills for them October 31st, which were duly honoured. An invoice specifying the casks were given to Kaye by Collard. October 31st, Kaye's cooper applied to Yates for permission to gauge and mark the casks on behalf of Kaye. The permission was granted, and the cooper did his work. Kaye, on November 19th, presented to Dixon for his acceptance a delivery order for the 26 puncheons he had bought of Collard, which Dixon refused to accept. The remaining 18 puncheons were sold September 7th, by Collard to Defendant Bond, invoice and specifications as before. Bond paid Collard September 9th. Three of these 18 puncheons were delivered to Bond by Yates, without any delivery order from Dixon, on the authority of Collard On November 19th, Bond presented a delivery order to Dixon for his acceptance, which was refused. This action was a feigned issue against Yates, Kaye, and Bond to try the right of possession and property in the 44 puncheons.

The sales to Collard having been sales on credit, and the bills being dishonoured, the whole Court agree that on the dishonouring of the bills, the right of prop-

erty and possession revested in Dixon. Littledale, J., remarks that as Collard never paid anything for the goods, he had clearly no right of property in them, and concludes his opinion by saying that this case decides two principles of law; so long as goods remain unpaid for in the immediate possession of the vendor, he may refuse to deliver them; the same is true if they are in possession of his warehouseman. The other principle is, that a second vendee of a chattel cannot stand in a better position than his vendor. But it is the opinion of Parke, J., which is so often quoted: "It is clear than the plaintiff was originally entitled to the goods; an invoice was made out to him, and he paid the price. I take it to be clear that by the law of England on the sale of a specific chattel, the property is in the vendee without delivery. The general doctrine that the property passes to the vendee by the contract of sale is questioned in Bailey *vs.* Culverwell,[1] in a note by the reporter, but I apprehend the rule is correct as confined to a bargain for a specfic chattel. Where there is a sale of goods generally, no property in them passes until delivery, because until then the goods are not ascertained; but when by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and pay the stipulated price, the parties are then in the same position they would be after the delivery of goods in pursuance of a general contract.

[1] 2 M. & R 566.

The appropriation is equivalent to delivery by the vendor, and the assent of the vendee to take the specfic chattel and pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." The learned Judge cites no authority in support of his opinion, and the case in hand was so far stronger than that of a mere agreement, that much of what he says must be considered as dictum, especially as none of his colleagues say a word upon the subject; some of Justice Littledale's remarks pointing rather to a contrary conclusion. But dictum though it be, it was uttered by one of the most eminent Common lawyers England has ever produced, and has carried great weight with it.

But in this very opinion, although the last few words are to the effect that the bargain vests the property, it is also declared that it does so when it is an *appropriation*, and therefore constructive delivery. And I think the cases will be found to require as a matter of fact some distinct act of appropriation before the property is changed. Now, this is upon the idea that an appropriation amounts to a delivery; if so, it must be as effectual as a delivery. This is expressly stated by Justice Parke, and is the basis of his reasoning, which may be summed up as follows: Delivery vests the title absolutely in the vendee; appropriation is a delivery; the bargain is an appropriation; therefore, the bargain vests the title in the vendee.

As before remarked, the authorities for this position

are numerous, generally mentioning the *risk* of the vendee as the cause or effect of the passing of the title by the bargain, and also following Dixon *vs.* Yates.[1] Wilde, J., in the last case, remarking that notwithstanding Sergt. Manning's learned note, since Dixon *vs.* Yates the Rule had never been doubted. And there is no lack of authority for the Rule in the American reports.[2]

Many other cases might be cited, but it is unnecessary here, and there are also numerous cases which deny the rule, and follow the older Common law;[3] but the larger number favor the Rule, although it is noticeable that there are but rare attempts to defend it logically, either in England or America. It is squarely stated and insisted on in Meade *vs.* Smith,[4] and an explanation is attempted in Potter *vs.* Coward,[5] the

[1] Sweeting *vs.* Turner, L. R. 7 Q. B. 310. Calcutta Co. *vs.* DeMattos, 32 L. J. Q. B. 322. Simmons *vs.* Swift, 5 B & C. 862. Chambers *vs.* Miller, 32 L. J. C. P. N. S. 30. Spartali *vs.* Benecke, 10 C. B. 212. Tarling *vs.* Baxter, 6 B. & C. 360. Gilmour *vs.* Supple, 11 Moore, P. C. 556. Aldridge *vs.* Johnson, 26 L. J. Q. B. 296. Langton *vs.* Higgins, 4 H. & N. 402. Laidler *vs.* Burlinson, 2 M & W. 602, 615. Bloxam *vs.* Sanders, 4 B. & C. 941. Meyerstein *vs.* Barbour, L. R. 2 C. P. 38.

[2] Merrill *vs.* Parker, 24 Me. 89. Townsend *vs.* Hargreaves, 118 Mass. 332. Meade *vs.* Smith, 16 Conn. 361. Olyphant *vs.* Baker, 2 Denio, 379. Bradley *vs.* Wheeler, 44 N. Y. 495. Joyce *vs.* Adams, 4 Seld. 296. Potter *vs.* Coward, Meigs, 26. Bass *vs.* Walsh, 39 Mo. 197.

[3] May *vs.* Gentry, 4 Dev. & Bat. 117. Jenkins *vs.* Jarrett, 70 N. C. 255. Hurlbut *vs.* Simpson, 3 Ired. (Law) 233. Butterfield *vs.* Baker, 5 Pick. 525. Hunn *vs.* Bowrie, 2 Caines, 44. Penniman *vs.* Hartshorne, 13 Mass. 87. Lanfear *vs.* Sumner, 17 Mass. 110. Lowrey *vs.* Stewart, 5 Kansas, 663. Barrett *vs.* Turner, 2 Neb. 175. Towsley *vs.* Dana, 1 Aikens, 345, (Vt). Hazard *vs.* Hamlin, 5 Watts, 201. Pleasants *vs.* Pendleton, 6 Rand. 473, and other cases.

[4] 16 Conn. 361.

[5] Meigs 26.

reasoning of which is so very unsatisfactory as to be an argument against what it seeks to establish. All the cases for the Rule concur in preserving to the vendor his right to retain the chattel until price paid or tendered, his right being a *lien* for the purchase money. The bargain then, passes the absolute right of property to the vendee, the mere naked possessory right remaining to the vendor. It follows, that the vendee must have all rights, before payment or delivery, which are independent of the mere right of possession; and the vendor has only those rights which grow out of a mere right of possession; not having any right of property in the thing, if the vendee were to acquire possession without payment the price, he, the vendor, cannot of course maintain trover for it—and the vendee can maintain trover against any one except him, who happened to get possession of it. These conclusions seem to me inevitably to flow from the Rule, and as, I think, none of them will be found tenable, the Rule must be a false statement of the law. It is believed that the true tests as to whether the property has or has not passed, are the rights of the vendor and vendee with regard to the thing, as against each other, and as against the world at large; or, as has been well stated in Pierce *vs.* Lyman,[1] can the vendee recover in a Court of Law or Equity the property he claims to have purchased of the vendor?

In order to maintain the action of trover, there must

[1] 28 Ark. 556.

be a right of property, general or special, and a right of possession, existing concurrently at the time of the conversion. Neither right of property without right of possession, nor right of possession without right of property is sufficient.[1] But if these rights concur the party so entitled can maintain the action; thus, there is this distinction taken in the books: where a thing is sub-pledged by a pledgee, or parted with, the pledgor does not thereby acquire a right to maintain trover; but where the possessor has merely a lien, and parts with the thing, his debtor's right of possession immediately revives, and he may maintain trover for it.[2] The authorities are clear that a lien is a mere personal right of detention; and an unauthorized transfer of the thing does not transfer that personal right—it depends absolutely upon possession.[3] There is great difference in this respect between a pledge and a lien. Relinquishment of a pledge does not determine the right of the pledgee, as the contract of pledge carries with it an implication that the security shall be made effectual to discharge the obligation; Per Blackburn and Mellor, JJ.[4] The question is discussed, and the same conclusion reached by Shaw, C. J.[5] He concludes his opinion

[1] Buller's N. P. c. 2, n. "A." 1 Archbold's N. P. 451.

[2] Note to 2 Saunders, Wilbraham *vs.* Snow (Sir E. V. Williams).

[3] Abbott's Law Dict. "Lien."

[4] Donald *vs.* Suckling, L. R. 1 Q. B. 604, 612. Legg *vs.* Evans, 6 M. & W. 36. Scott *vs.* Newington, 1 Moody & Rob. 252; Walters *vs.* Smith, 5 B. & Ald. 439.

[5] Doane *vs.* Russell, 3 Gray, 382.

on the point by saying: "If it be said that the right to retain goods without the right to sell, is of little or no value, it may be answered that it certainly is not so adequate a security as a pledge with a power of sale. Still, it is to be considered that both parties have rights which are to be regarded at law; and the rule must be adapted to general convenience." A lien is, in short, frequently like a distress at Common law, which gave a right of detention but not of sale.[1]

There is, then, as was observed by Mr. Justice Mellor, in Donald *vs.* Suckling, supra, a real distinction between a deposit by way of pledge for the payment of money, and a right to hold by way of lien for the same object. Now to apply this: A lien being a mere possessory right, upon relinquishment of possession this right is gone, and returns to the owner, who may immediately maintain trover; and yet, although the advocates of the Rule generally declare most positively that the vendor's right is a mere lien, after the bargain, if the vendor part with the goods before payment or tender, the vendee—the absolute owner, as they say—*cannot* maintain trover for them.[2] This lack of right in the vendee to maintain trover until payment or tender, has been constantly attributed to his lack of possessory right; but if he has all the right of property, the vendor will lose his lien if he

[1] 2 Kent's Com. 642.

[2] Bloxam *vs.* Sanders, 4 B. & C. 941. Wilmhurst *vs.* Bowker, 5 Bing. N. C. 541. 1 Chitty on Pleading, *172.

parts with the property, and the vendee's right to bring the action will be complete. This is not true, as has been shown, and in such cases the vendee is limited to his action for non-fulfillment of the contract, where the damages are very different from those in trover. Wilmhurst *vs.* Bowker, supra. It would thus seem, that the vendor's right is certainly as great as that of a pledgee, and much more analogous thereto than to that of a mere lien holder. Lord Holt says, in Coggs *vs.* Bernard: "A pawnee has a special property; for the pawn is securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to repay him." "Language," remarks Mr. Justice Blackburn, Donald *vs.* Suckling, supra, "certainly seeming to indicate that he has an *interest in the thing, a real right*, as distinguished from a mere personal right of detention." The fact that, after all, the vendor's right is more than a lien, is admitted by Bayley, J., in Bloxam *vs.* Sanders, supra, where he states that the vendor's right is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original *dominium*, and payment is a condition precedent on the buyer's part, and until he make such payment or tender he has no right to the possession; and Benjamin, in the very beginning of his chapter on "Liens," says that the vendor's right is *at least* a lien.

If, as Mr. Justice Bayley is forced to admit, the vendor's right grows out of his original dominium, it cannot be a mere right of possession, as he persists

in calling it. Modern writers, especially the advocates of the Rule, have been at some pains to separate the rights of property and possession, and have succeeded in doing so. It is perfectly clear that one man may have a complete right of property, and another a complete right of possession. True, where one man has a complete right of property, the right of possession is prima facie in him also, as property in personalty draws to it possession, as a general rule. But while they thus usually co-exist, one does not grow out of the other—they are entirely distinct. And if a man's right of possession is founded on his right of property *alone*, if his right of property goes, his right of possession goes with it, and cannot be left behind as a remnant; it is *no part of* the right of property or dominium; so that, once derive the vendor's right of possession from his dominium, and the latter is not transferred. It is to be observed, also, that whatever right the vendor has, *remains* to him; it is not given him by the vendee, who never had it, and as it is not a mere lien, it follows that the vendee's right of property not only *is not*, but *never has been*, complete.

But even while enunciating the Rule, the cases show a disposition to require definite specification and appropriation, which amounts, they say, to a delivery, it being universally conceded that, generally speaking, delivery will vest the title in the vendee. Delivery will not vest the title unless made with intention so to

do.[1] So, in a sale upon condition, as cash on delivery, if the vendor merely delivers the goods, trusting to receive payment immediately, the delivery will not divest him of his title. Leven *vs.* Smith, supra. If, on the other hand, the delivery was meant to vest the property, and there is no immediate insistance upon the condition, the condition will be considered waived.[2]

But, as a general rule, delivery will vest the title in the vendee, and though the price be unpaid, he may maintain trover against anyone who gets possession of the goods. And, therefore, if appropriation is delivery it would seem that it should confer on the vendee those rights which delivery confers; but it does not do this, and the difficulty is thus dealt with by Shaw, C. J.: "When goods are sold, and there is no stipulation for credit, or time allowed for payment, the vendor has, by the Common law a lien for the price; in other words, he is not bound actually to part with possession of the goods without being paid for them. The term *lien* imparts that by the contract of sale, and a formal symbolical or constructive delivery, the property has vested in the vendee. Because no man can have a lien on his own goods. If the holder is the owner, the right to retain is incident to the right of property. There is a manifest and marked distinction between those acts which, between vendor and vendee upon a

[1] Leven *vs.* Smith, 1 Denio, 573. Com. Dig. Tit. Agreement, B. 3, and cases. Palmer *vs.* Hand, 13 Johnson, 434. Ferguson *vs.* Clifford, 37 N. H. 103.

[2] Harris *vs.* Smith, 3 S. & R. 20

contract of sale, go to make a constructive delivery and that actual delivery which puts an end to the right of the vendor to hold the goods as security for the price."[1] But of what benefit to the vendee is this "constructive delivery," which as described by Mr. Justice Shaw is no delivery at all? Complete right of property is held to pass, because appropriation is delivery; but it does not entitle the vendee to the thing as against anyone. The whole effect of appropriation is to cast the risk on the vendee, and oblige the vendor, on payment or tender, to actually deliver the particular thing, or answer in trover; it is delivery, denuded of its essential, vital characteristics. The argument that because there is a *lien*, the property must have passed, which is also used by Colt, J.,[2] is approaching very nearly the logical fallacy complained of by Hilliard with respect to risk.

There is some difference between appropriation and presumptive delivery, or symbolical delivery. Appropriation, as spoken of by Parke, J., in Dixon *vs.* Yates, is merely specification, and upon that ground, as soon as there arose an *obligatio certi corporis*, there would obviously be a sale; and so some of the cases have held.[3] The leading English cases, and most American cases, require something more than specification. In

[1] Arnold *vs.* Delano, 4 Cush. 38, 39. [2] Morse *vs.* Sherman, 114 Mass. 432.

[3] Potter *vs.* Coward, Meigs, 22; Broyles *vs.* Lowrey, 2 Sneed, 25; Browning *vs.* Hamilton, 42 Ala. 484; Winslow *vs.* Leonard, 12 Harris, 14; McClung *vs.* Kelley, 21 Iowa, 508; Courtright *vs.* Leonard, 11 Iowa, 32; and see opinion by Erle J., Aldridge *vs.* Johnson, 26 L. J. Q. B. 300.

Aldridge *vs.* Johnson, the defendant was authorized to select barley from his heap, to fill his contract for the sale of barley with the plaintiffs. He did so, by filling the plaintiffs' sacks, and subsequently emptied them into the heap. This was very nearly an actual delivery, and the property was held to have passed.

In Langton *vs.* Higgins,[1] the facts were as follows: In January, 1858, C. agreed to sell plaintiff all the crop of peppermint oil grown on his farm that year, at a guinea per pound. In September, C. wrote to plaintiff for bottles to put the oil in, which were sent, and C. having weighed the oil, put it in the plaintiff's bottles, labeled them with the weight, and made out invoices. Before he had completed filling the bottles, he sold and delivered several of them to the defendant. Bramwell, B., remarked in the course of his opinion, "I do not think that when the oil was made the property passed; possibly there may have been an *obligatio certi corporis*, but the bottling was a clear delivery." This is a stronger case than Aldridge *vs.* Johnson; in that case, the act of appropriation was the act also of specification; here, the moment the oil was made there was specification; but this did not pass the property; it was the further act of appropriation, which was a clear presumptive delivery, upon which the decision of the court rested.

The question is discussed by Baron Parke in Wait

[1] 4 H. & N. 402.

vs. Baker.[1] The defendant, a corn factor, residing at Bristol, wrote to one L., at Plymouth, requesting samples of barley, and that L. would make him an offer of a cargo. This occured in December, 1846. In the same month L. wrote to defendant and sent samples of barley, at the same time offering to sell him 500 qrs. f. o. b., at Kingsbridge, or some neighboring port, for a certain sum for cash on handing bills of lading, or by acceptance, etc. Defendant accepted the terms. L. requested instructions about a vessel, which defendant gave, and asked to be advised when L. had taken up a vessel, so that he might get her properly insured. L. sent defendant a charter party not under seal of a vessel in which the barley was to be shipped, the charter party being in L.'s name.

In January, 1847, the vessel was loaded and L. received a bill of lading from the master by which the cargo was made deliverable at Bristol to the order of L. or assigns, on payment of freight. Subsequently, L. called at defendant's office at Bristol, and left the invoice and unindorsed bill of lading. He afterwards called again, and there was some dispute as to the quality of the barley. Defendant at length tendered L. the amount of the cargo in money, who refused to accept it, but took away the bill of lading, and indorsed it to plaintiffs. Defendant on the arrival of the vessel claimed and obtained part of the cargo. Plaintiffs produced their bill of lading, took the rest of the

[1] 2 Exch. 1.

cargo, and paid the freight. The jury found that the defendant did not refuse to accept the barley from L., and that the tender was unconditional. The action was trover for so much of the cargo as the defendants had obtained, the question of course being whether the property had passed to the defendants.

It will be observed that there had been originally an agreement for a certain quantity of barley of a certain kind; a subsequent selection and shipment of the required quantity; a delivery of an invoice and unindorsed bill of lading; a tender of the amount of the cargo. But the judgment of the court was for the plaintiffs. Baron Parke, after remarking that as the original contract was in general terms for 500 qts. barley, no property passed by it, goes on to say that if the goods are delivered to a common carrier, property would pass, as the carrier would be the *agent of the vendee*, that the present case is distinguishable, since the master of the vessel was not a common carrier, but merely the *agent of the vendor*, and therefore delivery to him did not pass the property.

The counsel for the defendant contended that there had been appropriation, and that that was sufficient to pass the property. To this Baron Parke answers: "The word *appropriation* may be understood in different senses. It may mean a selection on the part of the vendor, where he has a right to chose the article which he is to supply in performance of his contract; or it may mean that both parties have agreed that a

certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case; or it may mean where both parties agree upon a specific article in which the property is to pass, and nothing remains to be done to pass it. I must own I do not think the delivery in the vessel was an appropriation in this sense of the word, * * * in which sense alone it will pass the property. Defendant has his action against L. on the contract."

This case, and those of Langton *vs.* Higgins, and Aldridge *vs.* Johnson, supra, distinctly decide, as it seems to me, that something more than mere specification is necessary to pass the property, and they are therefore directly in the face of the oft-repeated Rule. Wait *vs.* Baker is particularly strong; neither specification nor unconditional tender passed the property, which remained with the vendor, because there was nothing which was really a delivery to the vendee. And this conclusion is in accordance with the dictum of Dampier, J., in Rusk *vs.* Davis,[1] that "unless there is something equivalent to actual delivery the tendency of the courts is to hold the sale incomplete."

But actual delivery is often impracticable, and a symbolical or presumptive delivery will have the same effect in many cases. Symbolical or presumptive delivery is more than mere specification; it is either actually delivering some evidence of title, as a bill of lading, or is some unequivocal act which would raise a pre-

[1] 2 M. & S. 406.

sumption of fact that an actual passing of the property was intended; a relinquishment by the seller of his right to control the property as his; in short "any act which divests the seller of his right to deal with the property as his own, and invests the buyer with it."[1] Usually, when actual delivery is impracticable, symbolical delivery will suffice. "The law accommodates itself to the necessities of business and the nature of property, making symbolical delivery sufficient where nothing but a constructive possession can ordinarily be had, and by no means overlooking the fact that merchandise sold may remain in the possession of the seller for specific purposes, among which are transportation and delivery at another place, where the property has actually passed from him and vested in the purchaser, and without affecting the validity of the sale."[2] In this case there had been a sale of logs, and marking them with the buyer's mark was construed a delivery. See also Boynton *vs.* Veazie, 24 Me. 286. A sale and delivery of a vessel may be good between the parties without a bill of sale or other instrument in writing—account kept of the proceeds of the vessel and the repairs prove a use and possession at least equivalent to formal delivery at the time of transfer."[3] And see opinion by Shepley, J. Ludwig *vs.* Fuller, 17 Me. 162. Delivery of a key has been held sufficient.[4] Of a bill

[1] 38 Law Mag. 164. Williams *vs.* Evans, 39 Mo. 204.

[2] Mill *vs.* Brown, 57 Me. 9.

[3] Badger *vs.* Bank, 26 Me. 428; Haskell *vs.* Greeley, 3 Me. 425.

[4] Vining *vs.* Galbraith, 39 Me. 496.

of sale;[1] of a bill of lading.[2] Where a vendor wrote to the keeper of his mare that he had sold her to the vendee, who also wrote to the same effect, this was held a constructive delivery, and was the execution of the contract of sale.[3] So of an agreement to hold in storage for the vendee.[4] Courts have varied in their views of what is and what is not a delivery, and it is of course impossible to note all these variations in an essay of this kind; but a symbolical delivery, when held so to be, has the effect of actual delivery, which is to vest in the vendee the full title of the vendor. Mere specification has no such effect, as I have endeavoured to show.

And now as to the power of the vendor to confer title on third parties. Although it is said by Blackburn in his Treatise on the Contract of sale, that by the English law, after the bargain is struck, the vested title of the first purchaser will prevail against the vendor himself and all claiming under him, in the absence of fraud, and this assertion has been expressly followed in New Jersey,[5] it is difficult to see how it can be maintained, unless, indeed, it is meant to include under

[1] Griffin *vs.* Grubb, 7 Texas, 603. Dugan *vs.* Nichols, 125 Mass. 45.

[2] Caldwell *vs.* Ball, 1 T. R. 205. Lanfear *vs.* Sumner, 17 Mass. 110. Gardner *vs.* Howland, 2 Pick. 602. Carter *vs.* Willard, 19 Pick. 11.

[3] Tuxworth *vs.* Moore, 9 Pick. 349.

[4] Weld *vs.* Cane, 9 Mass. 154. And see generally, Dunlap *vs.* Berry, 4 Scam. 327 Rickey *vs.* Zeppenfeldt, 64 Mo. 277. Hunn *vs.* Bowrie, 2 Caines, 44. Burge *vs.* Cone, 6 Allen, 412. Arnold *vs.* Delano, 4 Cush. 38. Lansing *vs.* Turner, 2 Johns, 16. Pleasants *vs.* Pendleton, 6 Rand. 473. Goddard *vs.* Binney, 115 Mass. 450. Clemens *vs.* Davis, 9 Barr, 263.

[5] Frazier *vs.* Fredericks, 4 Zab. 162.

the term "fraud," neglect to require immediate change of possession, or some other direct manifestation of a change of property. But the context, and the case cited, show that the statement was intended as a direct assertion, that the property passed absolutely by the contract, and it is the logical and necessary outcome of that doctrine. The courts of Ohio have adopted it, and in that State, delivery is unnecessary.[1] Birchard, C. J., dissents in the last case, and advocates strongly the "ancient rule" that delivery of some kind is necessary to change title to personalty. But the decision of the court is merely a strict adherence to the Rule, and must be the decision of any court which adopts the Rule and its consequences. In Roland *vs.* Gundy, there is a recognition of the hopeless conflict between the Rule and the maxim, "Nemo potest plus juris in alium transferre quam ipse habet" on the one hand, and the position taken by the large majority of the courts, who do but follow the earliest law, that of two purchasers, he to whom the property is first delivered will hold it, on the other.

But, it is said, the property certainly does pass as between the parties, by the bargain, but subsequent purchasers without notice ought not to suffer if the first purchaser leave the article with the vendor, and thereby lead them into error: "He who enables another to commit a fraud must bear the loss it occasions," is the principle upon which the state of the law

[1] Roland *vs.* Gundy, 5 Ohio, 202. Hooben *vs.* Bidwell, 16 Ohio, 509.

is explained. But it will be found to be a principle of very narrow application—too narrow to merit the name of "principle;" it is a mere fiction, a plausible and convenient method of explanation. If a bailee, clothed with possession, the indicium of title to personalty, and with the power, certainly, to exercise rights of property over the thing, sell it, the true owner can maintain trover against any one who has it.[1] The power of a possessor of goods to confer title is discussed in a learned opinion by Mr. Justice Bell, in McMahon *vs.* Sloan, just cited. The opinion is a most instructive one. In the course of it, the learned Judge enunciates the general principle that the title to things personal can pass from the true owner only by his own consent or voluntary act or by operation of law.

He then says there are several exceptions; the true owner cannot follow his property: 1. When the property is money, bank bills, etc., which from their nature pass by delivery. 2. Where the true owner by his own direct voluntary act confers on the person from whom the bona fide vendor derives title, the apparent right of property as owner, or disposal of as agent. This exception has been confined to cases where the owner, with the intention of sale, parts with the property under such circumstances as would entitle him to recall the possession from the vendee. 3. Where the true owner

[1] Hartop *vs.* Hoare, 3 Atkyn, 49. Note to Wilbraham *vs.* Snow, 2 Saunders, 91; Clark *vs.* Gilbert, 2 Bing. N. C. 136; McMahon *vs.* Sloan, 2 Jones, 229; Quinn *vs.* Davis, 28 P. F. S. 15. Nor can a finder or thief confer title. Cundy *vs.* Lin lsay, 3 App. Cases, 463; Robinson *vs.* Hartridge, 13 Fla. 501.

by his act or consent has given to another such *evidence* of a right of disposition as according to the usage of trade usually accompanies such authority, as when the consignee in a general bill of lading given by the owner, transfers to a third party. But if the bill of lading be not given or authorized to be given, the consignee cannot transfer the goods, even though the owner intrusted the goods to the party who caused the bill to be made, for the purpose of transportation. 4. It is said the owner may lose his right of pursuit by exhibiting to the world a third person as having power to dispose of his goods, either by giving him direct authority or conferring an implied one. As by permitting a person, with full knowledge of the facts, to deal with the property as his own—or by putting them into another's custody whose common business it is to sell.

These are the only exceptions the learned Judge is aware of, and he cites some authorities. It will be noticed, that the case of a vendor after contract is not strictly within any of these exceptions, although such an one can undoubtedly convey a good title. Was this because Justice Bell considered that he had the title to convey? The first exception is foreign to the present inquiry. The second is very questionable.[1] The third would amount to, and is restricted to, the very grossest carelessness, almost actual fraud. The fourth is untenable.[2] In the last case it is remarked that the

[1] Sanders *vs.* Keber, 28 Ohio St. 630, and cases cited.

[2] Wilkinson *vs.* King, 2 Camp. N. P. 335. Quinn *vs.* Davis, 28 P. F. S. 15. Ruckman *vs.* Decker, 8 C. E. G. 289.

protection of second purchasers is a peculiar doctrine of Equity, confined to cases where the purchaser of the *legal title* had no notice of an existing Equity. It is clearly stated in McMahon *vs.* Sloan, and in Vandyke *vs.* Christ,[1] that the rule requiring delivery of chattels as against second purchasers is not of Common law origin, but dates from the statutes 13 and 27 Eliz. and the construction put upon them, or rather upon one of them, in Twyne's case.

But this is expressly denied, and the authority for the denial is very strong, in Davis *vs.* Bigler,[2] and the two statutes are held to be merely declaratory, and, indeed, not to cover the case of a subsequent purchaser of chattels. The doctrine is held to be founded as above stated, namely, that it is a principle of Common law, that he who enables another to commit a fraud must bear the loss it occasions. This principle has been most strictly adhered to in some States. In Connecticut, in a case where a man bought a horse and took possession of him, and a week afterward hired him to the vendor who sold him to a third party, the title of the second vendee prevailed.[3] Neither Twynes' case nor the statutes will warrant this. Other authorities, but very few, thus carry the principle to its logical conclusion. But the mass of authorities limit it strictly to cases where in the original transaction, the vendor is allowed to retain possession. If

[1] 7 W. & S. 374. [2] 12 P. F. S. 246.

[3] Webster *vs.* Peck, 31 Conn. 495.

the vendee is allowed to take possession, unless title was intended to pass to him, a *bona fide* purchase from him will take no title.[1] The court says, in its opinion in Sanders *vs.* Keber: "It is said the possession under the contract, with the right to use as his own, clothes the vendee with the usual indicia of ownership, and as between the *bona fide* purchaser and the vendor, the latter would be estopped; but as no title passed to the vendee, he has none to confer on the *bona fide* purchaser." Again: "If the title does not pass out of the vendor for one purpose it certainly does not for another; a *bona fide* purchaser must obtain title through the vendee—and if he has no title he can confer none." (The last statement is a quotation from Coggill *vs.* R. R. Co., 3 Gray 545.) The logic of this is irresistible, and as a corollary, it may be said: If the title has passed to the vendee, the vendor cannot confer title upon the third parties, as he has none: Again, if the title passes out of the vendor for one purpose it certainly does for another, and having no title he can confer none. But he can confer title—is it not a necessary sequitur that he *has* it? It is submitted that the authorities cited abundantly show, that the results which could flow from the application of the so-called principle to the divesting of title to personalty, are only to be met with in cases of non-delivery by the vendor to the vendee—and it does not seem to me that the law in such cases is derivable from the "principle;" for it is

[1] Sanders *vs.* Keber, 28 Ohio St. 630, and cases.

admitted on all sides that the vendor may retain the thing until payment or tender, and the vendee's failure to take immediate possession is not *voluntary*, but *compulsory*, and no laches is attributable to him. More than this, if the vendee become possessed of the property without the vendor's consent or knowledge, the latter may maintain trespass for *removing his property*,[1] or trover.[2]

When anything remains to be done by the terms of the contract, the property does not pass.[3] It is a question of intention. Where the contract is expressly for Cash on Delivery, property does not pass until payment, unless it be evident that the vendor intended to waive the condition, and trust the vendee; something more than the mere fact of delivery is necessary to indicate this intention.[4] And it has been held, that where nothing is said about payment and delivery, they are to be concurrent; the sale is constructively for cash.[5] And this is the inevitable conclusion; for the price becomes due on an offer to deliver, and the article on an offer to pay; it is difficult to see why the title should pass when the sale is constructively to be

[1] Riley *vs.* Wheeler, 42 Vt. 528. [2] Ireland *vs.* Horseman, 65 Mo. 51.

[3] Langton *vs.* Waring, 18 C. B. N. S. 315. Scott *vs.* Wells, 6 W. & S. 369.

[4] Leven *vs.* Smith, 1 Denio, 573. Palmer *vs.* Hand, 13 Johns, 434. Wilmarth *vs.* Mountford, 4 Wash C. C. 82. Hodgson *vs.* Barrett, 18 Alb. Law Journal, 36. Henderson *vs.* Lauck, 9 Harris, 359. Hilliard on Sale, 22.

[5] Ferguson *vs.* Clifford, 37 N. H. 103. Cotton Co. *vs.* Stannard, 44 Mo. 71. Same *vs.* Plant, 45 Mo. 517. Robinson *vs.* Marney, 5 Blackf. (Ind.) 329. Cowgill *vs.* Ford, 2 Houston, (Del.) 167. Comyn's Dig. Tit. Agreement, B. 3. Kelly *vs.* Upton, 5 Duer, 340.

cash on delivery, and should not when it is expressly so. The truth is, that until offer on one part to perform, there are simply interdependent promises, for a discussion of which see Lester *vs.* Jewett, 1 Kernan, 454.

There is very considerable authority for the position that after the contract, payment or tender will vest the property in the vendee.[1] And this is not unreasonable; payment certainly does render the vendor liable in an action of trover, and as a subsequent sale, with notice to the purchaser, would be actual fraud on his part as well as on the part of the vendor, the first purchaser could maintain trover against him also; but if there is no notice, the second purchaser will be protected. Payment does, therefore, vest a special property in the vendee as against the vendor, but does *not* vest the absolute property; for if it did, no *bona fide* purchaser would be protected.

The opinion of Chief Justice Gibson in Hazard *vs.* Hamlin,[2] seems to me a clear explanation of the law. After reciting the rule as laid down by Blackstone, that property in goods is absolutely bound by a bargain completed by earnest, or part payment, he states that Mr. Christian, the annotator of Blackstone, adopts Lord Holt's opinion in Langfort *vs.* Tiler,[3] that earnest only binds the bargain, not the property—at least, not

[1] Lansing *vs.* Turner, 2 Johns. 16. Clay *vs.* Frayer, 8 Gill & Johns, 398. Pleasants *vs.* Pendleton, 6 Rand. 473. Cocke *vs.* Chapman, 7 Ark. 197. Davis *vs.* Ransom, 4 Mich. 238, Gardner *vs.* Howland, 2 Pick. 602.

[2] 5 Watts, 201. [3] 1 Salk, 113.

absolutely; that is, it gives the vendee a right to demand, but that demand, without payment of the whole, is void. "It seems to have been the opinion of that sound lawyer and eminent Judge (Lord Holt) that the acceptance of earnest induced no more than an engagement on the part of the vendor to give the vendee a reasonable time to consummate the bargain; and this is entirely consistent with what he immediately adds, that the vendor cannot sell the goods again before requesting the vendee to pay for them and take them away. That is, as I understand it, without subjecting himself to an action for the breach of the contract; for no one would pretend that payment of part of the price, if the article were left in the vendor's shop where prejudice to customers from the colorable ownership would be most likely to happen, would entitle the vendee to follow it in the hands of purchasers. But where nothing is paid or delivered, it is agreed on all hands the contract is executory."

The fallacy of the Rule consists in the failure to recognize the inherent difference between a contract and a conveyance. This subject is most ably discussed in Mr. Austin's lectures on "Jurisprudence." It is there said, most convincingly, I think, that "no right to a thing, properly speaking, is ever given by contract." Where a thing is the subject of a contract, the right is not over, or in the thing, but a right to an act of transfer, or assignment of the thing, on the part of the

obligor.[1] There are rights *in personam*, and rights *in rem*. The former, against some definite person, upon whom is imposed the corresponding obligation. Where one man has the right of forcing another to do a certain thing, this is a right *in personam;* and where this is the right to force that person to deliver a certain thing, it is a right to acquire that thing—*jus ad rem acquirendam*—which is of course a right to have something done in the future implying ex necessitate that it is not yet done. When this transfer takes place, the transferee is invested with a right *in* the thing—*jus in re*. This right is available, not against a particular individual merely, but against the world. It is not right to *acquire* but a right to *retain*. *Jus ad rem* and *jus in re* were carefully distinguished in the Civil law. There the contract of sale gave *jus ad rem*, but only delivery gave *jus in re* the maxim of the law being "*Traditionibus et usucapionibus non nudis pactis dominia rerum transferentur.*"

The Civil law has been followed as a general rule in France, and practically in this particular, but the French Jurists say that the contract transfers *jus in re*, an assertion pronounced "exquisitely absurd" by Austin, who demonstrates vigorously the impossibility of an *obligation* being a conveyance, and concludes his hardly complimentary remarks on the French lawyers, as follows: "When they talk of *obligation* as imparting dominion over property, they talk with an absurdity

[1] Vol. I, 388.

which has no example, and which no example can extenuate. If they had understood the system which they servilely adored and copied, they would have known that obligation excludes the idea of dominion, that it imparts to the obligee, *jus in personam*, and *jus in personam* merely."[1] And Mr. Campbell in a note to his edition of Mr. Austin's lectures commenting upon the Rule, says that the right conferred by the contract is shorn of some of the incidents of a full right of property by the operations of the rules of law and Equity as to the rights of unpaid vendors, by the Bill of Sale Act, and the Reputed ownership clauses in the bankrupt act (see 21 Jac. I, C. 19.) "All which are clumsy expedients for obtaining the results which naturally flow from the simple principle of the Roman law and the systems consciously based on that law, viz: *Traditionibus non nudis pactis dominia rerum transferentur.*" He adds, that it is curious to see how alike are the practical results which flow from such different theories. That is true; but the results flow logically from one theory, and not from the other, and Mr. Campbell's remarks are much to the point in condemning as clumsy expedients those fictions and enactments by which it has been sought to rescue the law from the unfortunate snarl in which it had become entangled through the abandonment of first principles.

I have endeavored to show, first, that there is a necessary difference between sale and exchange, and

[1] Vol. II, 10003 *et seq.*

second, that while sale and the contract of sale are generally called synonymous, this is an erroneous statement of the law, arising originally from a misconception of the Civil law in holding risk and property inseparable, a doctrine which that system distinctly repudiates; that the true tests as to whether the property has or has not passed, are the rights and powers of vendor and vendee with regard to the thing, and that tried by these tests, the buyer's right after mere contract, appears utterly destitute of the qualities of an absolute right of property; and that, as remarked by Mr. C. E. Green, in his note to Hurff *vs.* Hires,[1] the principle of the normal sale pervades and controls the law of sale to-day.

I have tried to make no statement in the foregoing pages unsupported by authority; yet I am deeply conscious, that despite my best efforts, errors may abound. It is recorded of Sir Lyttleton Powys, that while on the bench he never boldly stated that such and such was the law, but always prefaced his opinion with the words, "I humbly conceive." So good an example deserves to be followed—let me say, therefore, with perhaps more sincerity than Sir Lyttleton, that I but "humbly conceive" the law to be as I have written it.

L. S. L.

February, 1880.

[1] 18 Am. Law. Reg. 161.

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